A **KEVIN GOLDMAN**

v.

GERALDINE AUDREY HERRERA

B HIGH COURT MALAYA, KUALA LUMPUR
NORAINI ABDUL RAHMAN J
[DIVORCE PETITION NO: 33-1817-2010]
21 NOVEMBER 2012

C ***FAMILY LAW:*** *Children - Custody - Application to vary decree nisi and agreement - Child of marriage sexually abused by grandfather - Whether child needed protection against grandfather - Whether court under additional duty to protect child - Whether "extended family" under s. 17 Child Act 2001 included grandfather - Whether there was risk that child* D *would subject to physical, emotional and sexual harm if decree nisi not varied*

FAMILY LAW: *Divorce - Decree nisi - Application to vary decree nisi and agreement - Child of marriage sexually abused by grandfather - Whether child needed protection against grandfather - Whether court under* E *additional duty to protect child - Whether "extended family" under s. 17 Child Act 2001 included grandfather - Whether there was risk that child would subject to physical, emotional and sexual harm if decree nisi not varied*

F ***CIVIL PROCEDURE:*** *Contempt of court - Committal proceedings - Breach of terms of decree nisi and agreement - Proper procedure for filing committal proceedings - Whether under O. 52 of the Rules of the High Court 1980 and notice of ancillary relief under Divorce and Matrimonial Proceedings Rules 1980*

G

The parties in this case were married and had a daughter ('M') from the said marriage. Subsequently the parties filed a mutual divorce and as part of the *decree nisi*, entered into a consensual divorce and mutual settlement which became part of the *decree* H *nisi*. It was part of the agreement that both parties would share equal joint custody of M, whereby M was to live with her father ('PH') and his parents continuously for three weeks and then with her mother ('PW') for a period of three weeks. However, after the divorce, PH remarried and moved out of his parent's house, I leaving M in the care of PH's parents for the entire day. PH would pick M up at night and take her home to his place. This arrangement provided the opportunity to PH's father, Rupert Goldman to spend more time with M after she finished school. It

was subsequently found that Rupert Goldman had been sexually abusing M whereby, he had been sexually molesting her over a period of two years and even took compromising photographs of M with his handphone. Rupert Goldman was subsequently arrested and charged with four counts under s. 354 of the Penal Code. As a result of these events, PW applied for ancillary relief to vary the terms of the *decree nisi* as well as the said agreement, among others, that PW be given the sole guardianship, custody, care and control of M and PH denied access to M. On the other hand, PH counterclaimed to file committal proceedings for breach of the terms of the *decree nisi* and the said agreement and also claimed for care, custody and control of M. However, PW raised a preliminary objection and stated that the proper procedure to file committal proceedings under O. 52 of the Rules of the High Court 1980 ('RHC 1980') and by way of notice of ancillary relief under the Divorce and Matrimonial Proceedings Rules 1980 ('Rules') and not *via* an affidavit in reply.

Held (allowing PW's application and dismissing PH's counterclaim):

(1) The counterclaim of PH for committal and other reliefs was wrong in procedure. It should have been made under O. 52 of the RHC 1980 for committal proceedings and as for the variation order it should have been filed by way of notice for ancillary relief as set out under rr. 56(1) and (3) of the Rules. Therefore, the preliminary objection was valid and PH's counterclaim was dismissed. (para 6)

(2) M, being the main witness for the case against Rupert Goldman, needed to be given protection until the case was disposed of. She was also seeing a child counsellor to overcome her trauma and to help prepare her to return to school and continue a normal life. (para 17)

(3) The power and jurisdiction to vary the *decree nisi* and the agreement was provided under s. 97 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act'). The word "agreement" in the section would include the agreement which is part of the *decree nisi*. (paras 28 & 29)

(4) More care should be given when dealing with the issue of contact in light of allegations of sexual abuse as a child who is a victim of sexual abuse would be in dire need of the court's protection. When faced with this situation, the court

has an additional duty to protect under s. 17 of the Child Act 2001. The "extended family" as provided under s. 17 would include M's grandfather, Rupert Goldman. If the *decree nisi* was not varied, there was a real risk that M might be harmed either physically, emotionally or sexually. The risk was too great and too real and the court was under a duty to protect M from harm. (paras 29 & 30)

(5) Having considered all the circumstances of the case and taking the wishes of M into consideration as well as the Convention on the Right of the Child, to which Malaysia is a signatory, and s. 88(2)(b) of the Act, the court allowed PW's application with a reduction in the amount of maintenance. (paras 39-41)

Case(s) referred to:
Hoo Tat Fong lwn. Lim Cheun Eng [2001] 2 CLJ 638 HC ***(refd)***
Ngu Chu Chiong v. Lina Soo [2008] 2 CLJ 783 CA ***(foll)***
Soon Peck Wah v. Woon Che Chye [1998] 1 SLR 234 ***(foll)***

Legislation referred to:
Child Act 2001, s. 17
Divorce and Matrimonial Proceedings Rules 1980, r. 56(1), (3)
Law Reform (Marriage and Divorce) Act 1976, ss. 52, 88(2)(b), 97
Penal Code, s. 354
Rules of the High Court 1980, O. 52

For the petitioner husband - Noor Azah Azizan Mohammed Ali Azizan; M/s WL Lee - Azizan
For the petitioner wife - Vignesvary Alahakone; M/s Alahakone & Assocs

Reported by S Barathi

JUDGMENT

Noraini Abdul Rahman J:

[1] Both parties were married on 25 November 2000. They have one child, a daughter, from the said marriage. Both parties subsequently filed a mutual divorce on 29 November 2010. The petitioner husband (PH) remarried on 26 November 2011. As part of the *decree nisi*, an agreement known as "Consensual Divorce and Mutual Settlement" (the agreement) became part of the *decree nisi* and the agreement dated 25 March 2010 is attached to the *decree nisi*. Reproduced below is the *decree nisi* and the relevant part of the said agreement.

DECREE NISI
(PERCERAIAN)

PETISYEN DI ATAS telah didengar pada hari ini dan Yang Arif Pesuruhjaya Kehakiman SETELAH MEMBACA Petisyen Perceraian Bersama bertarikh 15 haribulan Oktober 2010, Afidavit Mengenai Kebenaran Pernyataan Dalam Petisyen oleh KEVIN GOLDMAN (NO. K/P: 670312-10-5139) pada 15 Oktober 2010 dan Afidavit Mengenai Kebenaran Pernyataan Dalam Petisyen oleh GERALDINE AUDREY HERRERA (NO. K/P: 680218-05-5066) yang diikrarkan pada 15 haribulan Oktober 2010 dan kesemuanya telah difailkan disini DAN SETELAH MENDENGAR Encik Ramesh Sivakumar Peguamcara bagi pihak Pempetisyen-pempetisyen yang dinamakan diatas dengan kehadiran Pempetisyen Isteri dan Pempetisyen Suami MAKA ADALAH DENGAN INI DIUMUMKAN DAN DIDEKRIKAN bahawa Perkahwinan yang didaftarkan pada 25 haribulan November 2000 di hadapan Pendaftar Perkahwinan di Gereja Katedrel, St. Mary's Kuala Lumpur melalui Sijil Perkahwinan No. 924485 diantara KEVIN GOLDMAN (NO. K/P: 670312-10-5139) dan GERALDINE AUDREY HERRERA (NO. K/P: 680218-05-5066) adalah dibubarkan menurut s. 52 Akta Membaharui Undang-undang (Perkahwinan dan Perceraian) 1976 (Akta 164) melainkan jika ada sebab-sebab yang mencukupi dibuktikan kepada Mahkamah dalam tempoh TIGA (3) bulan mulai dari tarikh Dekri ini mengapa Dekri ini tidak patut dijadikan mutlak DAN ADALAH DIPERINTAHKAN bahawa peruntukan-peruntukan berkenaan nafkah, hak penjagaan, pemeliharaan dan kawalan terhadap anak, (M), nafkah terhadap isteri dan juga pembahagian harta adalah seperti yang termaktub dalam perjanjian "Consensual Divorce And Mutual Settlement" bertarikh 25 haribulan Mac 2010

DAN AKHIRNYA DIPERINTAHKAN bahawa kos petisyen ini ditanggung oleh Pempetisyen Suami.

Bertarikh pada 29 haribulan November 2010

NAMIRAH HANUM MOHAMED ALBAKI
Penolong Kanan Pendaftar
Mahkamah Tinggi
Kuala Lumpur

Consensual Divorce and Mutual Settlement
Dated this 25th day March 2010

Mutual Agreement between Kevin Goldman (NRIC No. 670312-10-5139) ("Kevin") and Geraldine Audrey Herrera (NRIC No. 680218-05-5066) ("Audrey") to be incorporated as the terms of the Joint Divorce Petition pursuant to prayer 2 of the Joint Divorce Petition (Petisyen Perceraian Bersama);

(1) Custody, Care and Control

Both Kevin and Audrey mutually to an equal joint custody of (M) whereby it is generally agreed between the parties that (M) will in each calendar month spend fifty percent (50%) of her time with Kevin at 3A-5-1, Pantai Panorama Condominium, Jalan 112H Off Jalan Kerinchi, 59200 Kuala Lumpur whereas the balance fifty percent (50%) of her time will spent with Audrey at E-LG2-3, Bayu Angkasa Condominium, Jalan Medang Kapas, Bukit Bandaraya, Bangsar, 59100 Kuala Lumpur however subject to any variations to be mutually agreed upon by the parties or upon any variations made by the court on the application of the parties hereto. This arrangement is subject to rotation in the following format whereby for instance on the 1st and 3rd weeks of the months (M) will spend 3 nights a week with Kevin whereas on the 2nd and 4th weeks of the month (M) will spend four nights with Kevin. The same arrangement and format equally applies to Audrey on a rotation basis.

...

(2) Guardianship

(a) Both Kevin and Audrey mutually agree that the guardianship of (M) shall be vested equally between Kevin and Audrey until (M) attains the age of majority and as such all matters pertaining to the upbringing, welfare, care, education, discipline and religion of (M) shall be mutually decided by both Kevin and Audrey and no one party shall have any overriding powers over the other in respect of the guardianship of (M).

...

...

(3) M's Insurance Fund and Education Fund

(a) It is mutually agreed between Kevin and Audrey that Kevin shall provide and pay toward (M's) medical expenses whereby Kevin Shall in furtherance of such intention and undertaking continue paying towards (M's) Prudential Medical Insurance till the policy matures.

(b) It is also mutually agreed between Kevin and Audrey that Kevin shall provide towards (M's) Educational Expenses up to the level of a university education (bachelors

degree) whereby Kevin shall in furtherance of such undertaking create an education fund based on a contribution up to RM200,000.00 for the benefit of (M).

(4) Child Maintenance and Support

It is mutually agreed by both Kevin and Audrey that they both shall mutually and equally provide towards (M's) monthly child maintenance in the sum of RM700.00 per month. Such provision shall cover the following expenses namely living expenses, recreational classes, food, clothing, toys, gifts, and all other expenses direct or incidental to (M's) up bringing. In view of the shared custody, it is mutually agreed by both Kevin and Audrey that the monthly child maintenance in the sum of RM700.00 shall be equally shared between Kevin and Audrey in the sum of RM350.00 each effective from January 2010.

...

(7) (M's) School Arrangement

...

This proposal is the FINAL offer and will not be valid after 31 March 2010.

Signed	Signed
Kevin Goldman	Geraldine Audrey Herrera

[2] Because of certain events which will be dealt with later in this judgment, the petitioner wife (PW) now apply for ancillary relief to vary the terms of the *decree nisi* as well as the said agreement. Reproduced below are her prayers:

(a) Bahawa Perjanjian Perceraian yang dilampirkan bersama *Decree Nisi* bertarikh 29 November 2010 dibenarkan untuk diubahkan;

(b) Bahawa hak penjagaan, jagaan, kawalan dan pemeliharaan tunggal (sole guardianship, custody, care and control) anak perkahwinan, (M) (selepas ini dirujuk sebagai "anak tersebut") diberikan kepada Pempetisyen Isteri;

(c) Bahawa Pempetisyen Suami dinafikan akses kepada anak tersebut sehingga penyelesaian Kes Jenayah No.: 183761-01-2012 dan 183762-01-2012 Rupert Goldman;

(d) Bahawa Pempetisyen Suami dilarangkan daripada mendedahkan anak tersebut kepada ahli keluarga Pempetisyen Suami;

(e) Bahawa Pempetisyen Suami membayar nafkah sebanyak RM3,000.00 sebulan untuk anak tersebut;

(f) Bahawa Pempetisyen Suami membayar untuk kesemua perbelanjaan perubatan, pergigian, pendidikan dan aktiviti tambahan anak tersebut sehingga anak tersebut menghabiskan pendidikan tertiary;

(g) Bahawa passport antarabangsa anak tersebut untuk diserahkan kepada Pempetisyen Isteri;

(h) Bahawa Pempetisyen dijadikan pemegang amanah ('trustee') untuk Dana Pendidikan anak tersebut;

(i) Bahawa Pempetisyen Suami mengemukakan maklumat tentang Dana Pendidikan dan Insuran anak tersebut seperti dinyatakan dalam Perjanjian Perceraian, dalam tempoh masa 7 hari daripada tarikh perintah ini;

(j) Kos permohonan untuk ditanggung pempetisyen Suami;

(k) Mana-mana relif selanjutnya dan lain seperti yang Mahkamah Mulia ini anggap patut.

[3] PW's application is supported by her affidavit in support affirmed on 26 April 2012 (encl. 11). PH in his affidavit affirmed on 30 May 2012 counterclaimed amongst others to file committal proceedings for breach of the terms of the *decree nisi* and the said agreement against PW. PH also claimed for care, custody and control of the child known as M, amongst others. (see para. 38 of his affidavit as in encl. 13).

[4] Before submission, counsel for PW, Miss Alahakone raised and submitted on the preliminary objection. According to her, there is no provision under the matrimonial rules or otherwise for PH to seek committal proceedings and counterclaim *via* an affidavit in reply. According to her, the proper procedure is to file committal proceedings under O. 52 of the Rules of the High Court 1980 and by way of notice of ancillary relief under the Divorce and Matrimonial Proceedings Rules 1980.

[5] In the Court of Appeal case of *Ngu Chu Chiong v. Lina Soo* [2008] 2 CLJ 783, His Lordship Zulkefli Makinudin JCA (as he then was) said the following:

(1) On 17 December 1987, the petitioner filed a Divorce Petition No. KG 61 of 1987 in the High Court (I) at Kuching, praying for *inter alia*, judicial separation, division of property and a monthly maintenance of RM1,500. A consent order was made on 14 June 1989 including a monthly maintenance of RM1,500.

…

(4) The petitioner subsequently filed the application by way of a summons-in-chambers on 2 November 1998 to vary the terms of the consent order in Divorce Petition No. KG 61 of 1987 made on 14 June 1989 respecting maintenance.

Preliminary Objection

At the outset of the hearing of the application before the learned judge of the High Court, the respondents had raised preliminary objections on the following grounds:

(1) the application is made in the wrong proceedings;

(2) the application is made by way of a wrong mode;

(3) the application for ancillary relief in the main action had been struck out by this honourable court; and/or

(4) the application is *mala fide* and vexatious.

Finding Of The High Court

Having heard the arguments of both parties the learned judge of the High Court overruled the preliminary objections by the respondents with costs. The learned judge *inter alia* held that the petitioner's application by way of summons-in-chambers dated 2 November 1998 is procedurally correct and proper.

…

Decision On Appeal

A We heard the appeal by the first respondent on 8 May 2007 and we unanimously allowed the appeal. We now give the reasons for our decision as follows:

We are of the view the learned judge of the High Court erred in law in holding that the petitioner's application by way B of summons-in-chambers dated 2 November 1998 is procedurally correct and proper when in fact it contravenes the provisions of the rules set out in the Divorce and Matrimonial Proceedings Rules 1980 ("the 1980 Rules") read in conjunction with the provision of the Act. Rule 2(1) of the 1980 Rules defines C "ancillary relief to mean, *inter alia*, a variation order which includes an order for maintenance under s. 83 of the Act. Rules 56(1) and (3) of the 1980 Rules provide that an application for a variation order, being not an application for ancillary relief which is required to be made in the petition or answer) shall be made by notice in Form 11 as set out in the Schedule to the 1980 Rules. D Rule 91(1)(b) of the 1980 Rules provides that except where otherwise provided by the 1980 Rules, every application in a matrimonial proceeding shall be made by summons.

It is our judgment that as rr. 56(1) and (3) of the 1980 Rules specifically provide for the mode of application for a variation E order, such application thus falls under the exception of r. 91(1)(b) of the 1980 Rules. In the premises, the learned judge of the High Court therefore erred in law in holding that r. 91(1)(b) of the 1980 Rules applies to every application in matrimonial proceedings including the said application. In our view the learned judge ought F to have held that the application should be made by way of Form 11 notice and not by way of summons-in-chambers.

...

[6] Based on the Court of Appeal decision above, I hold the G counterclaim of PH for committal and other reliefs is wrong in procedure. It should have been made under O. 52 of the Rules of the High Court 1980 for committal proceedings and as for the variation order, it should have been filed by way of notice for ancillary relief as set out under r. 56(1) and (3) of the Divorce H and Matrimonial Proceedings Rules 1980. As such, I rule that the preliminary objection is valid and I therefore dismiss the PH's counterclaim.

[7] Now back to the main issue of the application by PW I in encl. 10 to vary the *decree nisi* and the said agreement. In her affidavit in support at encl. 11 she averred that there was a material change in the circumstances since the *decree nisi*.

In the *decree nisi*, both had agreed to share access to M equally. M was to live with her father Kevin (PH) and his parents continuously for three weeks and then M would live with her (PW) for a period of three weeks. She said that although the said agreement was to ensure that M spend equal time with both her parents, PH had moved out of his parent's house after their divorce and M was left in the care of his parents for the entire day and PH would pick M up at night and take her home to his place for the nights. This arrangement provided the opportunity for Kevin's father, Rupert Goldman to spend more time with M after she finished school. She further said that on the 12 December 2011 M was admitted by her to Pantai Hospital for appendicitis and she was hospitalised again on 2 January 2012 as her wound had reopened and needed re-stitching. During this period of hospitalisation she was informed by the doctors of M that M was complaining of constant headaches which were quite unusual for a child of M's age. PW had put down to the fact that M was adversely affected by their divorce.

[8] The doctor recommended that M see a doctor to assess her problem. Upon the advice of the psychologist, M slowly began to open up and confided in PW. She told PW she was being sexually abused by Kevin's father, Rupert Goldman.

[9] M told her that her grandfather had been sexually molesting her over a period of almost two years. M said that her grandfather would fetch her after school, took her to different venues including hotel rooms, car parks, his friend's empty home and sexually molested her in various ways. He would then take her home late in the evening in time for dinner. No one in the house including Kevin and his mother suspected anything nor did they bother to ask M or the grandfather what they were doing together the whole afternoon. Kevin would then take M home with him for the night after dinner.

[10] M gave PW all the details including the fact that her grandfather even took compromising photographs of her with his handphone. She told PW where he kept them in his house. M said she questioned her grandfather about why he was doing it to her and he assured her that it was absolutely normal and that all adults do it with the people they love just as Jesus love her. He even told M what to expect when she reaches puberty.

[11] PW shocked and grief stricken when she heard all this from M. She blamed herself for not being able to protect her. She was even angrier with herself because M could not bring herself to confide in her when it first happened. She believed she failed to give her adequate protection as a mother.

[12] PW had informed the doctor in Pantai Hospital about what M had revealed to her. She was then advised to take M immediately to University Hospital where there was a scan team to carry out all the examinations on M.

[13] M was admitted in University Hospital where the police and the doctors took her statement and examined her. Based on M's statements and evidence the police arrested Kevin's father, Rupert Goldman and kept him in remand for six days ie, from 10 to 16 January. The police managed to recover the pictures that were taken of M from his home. The police also traced all the hotels that M had been taken to after school by Kevin's father.

[14] Kevin's father, Rupert Goldman, was eventually charged on 26 January 2012 under s. 354 of the Penal Code. He pleaded not guilty and claimed trial. He was let off on bail of RM15,000. The case was fixed for trial 21 and 22 May 2012 and is still at the time of this application, part heard. As part of the condition of the bail, Kevin's father is not to have any contact with M pending the disposal of the case.

[15] To support her statement above, PW exhibited copies of the charge sheets which is reproduced below:

Lampiran A

Pertuduhan

Bahawa Kamu Pada Bulan April 2010 Diantara Jam Lebih Kurang 1.00 Petang Hingga 6.00 Petang Bertempat Di Dalam Sebuah Bilik No. 2525 Di Alamat Sheraton Imperial Kuala Lumpur Hotel, Jalan Sultan Ismail Di Dalam Daerah Dang Wangi, Di Dalam Bandaraya Kuala Lumpur, Negeri Wilayah Persekutuan Didapati Telah Mencabul Kehormatan Dengan Meraba-raba Kemaluan Cucu Perempuan Kamu Nama [M], Surat Beranak Nombor xxx, Umur 7 Tahun 3 Bulan. Oleh Yang Demikian Kamu Telah Melakukan Kesalahan Di Bawah Seksyen 354 Kanun Keseksaan Dan Boleh Dihukum Dibawah Seksyen Yang Sama.

Hukuman: Hukuman Bagi Kesalahan Dibawah Seksyen 354 KK Ialah Hukuman Penjara Sepuluh Tahun Atau Denda Atau Sebat, Atau Dengan Mana-mana Dua Daripada Hukuman-hukuman Itu.

(I.0: Insp Ellyia Ullfah Binti Mazlan)

Lampiran A

Pertuduhan Pertama

Bahawa Kamu Pada 6 Mei 2011 Diantara Jam Lebih Kurang 1.00 Petang Hingga 6.00 Petang Bertempat Di Sebuah Bilik No. 1127 Di Alamat Cititel Hotel, Mid Valley City, Lingkaran Syed Putra Di Dalam Daerah Brickfields, Di Dalam Bandaraya Kuala Lumpur, Negeri Wilayah Persekutuan Didapati Telah Mencabul Kehormatan Dengan Meraba-raba Kemaluan Cucu Perempuan Kamu Nama [M], Surat Beranak Nombor xxx, Umur 8 Tahun 5 Bulan. Oleh Yang Demikian Kamu Telah Melakukan Kesalahan Di Bawah Seksyen 354 Kanun Keseksaan Dan Boleh Dihukum Di Bawah Seksyen Yang Sama.

Pertuduhan Kedua

Bahawa Kamu Pada Pertengahan Tahun 2011 Jam Lebih Kurang 3.00 Petang Bertempat Di Sebuah Bilik Di Alamat 3A-5-1, Pantai Panorama Off Jalan Kerinchi Di Dalam Daerah Brickfields, Di Dalam Bandaraya Kuala Lumpur, Negeri Wilayah Persekutuan Didapati Telah Mencabul Kehormatan Dengan Meraba-raba Dan Menjilat Kemaluan Cucu Perempuan Kamu Nama [M], Surat Beranak Nombor xxx, Umur 8 Tahun 5 Bulan. Oleh Yang Demikian Kamu Telah Melakukan Kesalahan Dibawah Seksyen 354 Kanun Keseksaan Dan Boleh Dihukum Dibawah Seksyen Yang Sama.

Hukuman: Hukuman Bagi Kesalahan Dibawah Seksyen 354 KK Ialah Hukuman Penjara Sepuluh Tahun Atau Denda Atau Sebat, Atau Dengan Mana-mana Dua Daripada Hukuman-hukuman Itu.

(I.0: Insp Ellyia Ullfah Binti Mazlan)

Lampiran A

Pertuduhan Ketiga

Bahawa Kamu Pada Pertengahan Bulan Oktober Tahun 2011 Jam Lebih Kurang 1.00 Petang Bertempat Di Dalam Sebuah Kereta Jenis Hyundai Matrix MPV Warna Hitam Nombor Pendaftaran BHS 6996 Di Alamat Lot Parkir 269, Level 2, Pantai Panorama Off Jalan Kerinchi Di Dalam Daerah Brickfields, Di Dalam Bandaraya Kuala Lumpur, Negeri Wilayah Persekutuan Didapati Telah Mencabul

A Kehormatan Dengan Meraba-raba Dan Memasukkan Jari Ke Dalam Kemaluan Cucu Perempuan Kamu Nama [M] Goldman, Surat Beranak Nombor xxx, Umur 8 Tahun 10 Bulan. Oleh Yang Demikian Kamu Telah Melakukan Kesalahan Di Bawah Seksyen 354 Kanun Keseksaan Dan Boleh Dihukum Di Bawah Seksyen Yang Sama.

B

Hukuman: Hukuman Bagi Kesalahan Dibawah Seksyen 354 KK Ialah Hukuman Penjara Sepuluh Tahun Atau Denda Atau Sebat, Atau Dengan Mana-mana Dua Daripada Hukuman-hukuman Itu.

(I.0: Insp Ellyia Ullfah Binti Mazlan)

C

[16] After all this happened, M was afraid to go to school as she was afraid that her father and/or her grandfather would come to the school and forcefully take her against her wishes. The school authorities informed PW that without a court order they could not D keep M's father away from M.

[17] M is the main witness for the case against Kevin's father, Rupert Goldman and M needs to be given protection until the case is disposed of. She is also seeing child counsellors to E overcome her trauma and to help prepare her to return to school and continue a normal life.

[18] Despite this PH still calls and insists on speaking to M and PW noticed that M is getting more and more agitated when her father calls and insists on speaking to her. PW allowed PH F to speak to M on the phone but she is dreading seeing her father as she believes her father would be furious with her for revealing to the police about his father (Rupert Goldman).

[19] PW further averred that PH cannot be allowed to have G access to M pending the criminal case, as allowing him access would provide him with the opportunity to tamper with the evidence of M. Kevin's father is being charged with sexually abusing M and it is certainly not in the interests of M to be forced to see her father.

H

[20] Apart from the alleged sexual abuse and M being the main witness at Rupert Goldman's criminal trial, PW also averred that the remarriage of PH has had an adverse impact on M. She said, that during the marriage with PH, he was an active practising I Christian and used to attend St Mary's church with his parents regularly on Sundays. They were very religious and were active members of the church.

[21] Since his remarriage to a Muslim, one Khatijah Ibrahim, PH has converted and adopted the Islamic faith. A

[22] In light of the criminal case against Kevin's father, M and PW are also fearful that PH may convert M to Muslim if he is given custody or access to her at any time now. If PH converts M in breach of the terms of the *decree nisi*, PW may not be able to take custody of M ever again. Besides, PH can easily state that the civil courts have no longer any jurisdiction over him being a Muslim. B

[23] PW further averred that PH is quite capable of converting M and taking full custody of M to prevent her from testifying against his father as PW know that he will do anything to protect his family's reputation. PH and his father can easily intimidate M not to testify against her grandfather. C D

[24] She added by saying PH had abandoned M in the case of his parents and this forms an allegation by PW that PH had not complied with the terms of the *decree nisi* and the agreement.

[25] On the other hand, PH in his various affidavits averred that during the access of M with him, he rarely leave M with his parents. He allege that he is now married whereas PW has an intimate relationship with a boyfriend. In fact he allege that PW has many boyfriends, mostly white (orang berkulit putih). PH objects to the fact that he was denied access to M. According to him, he has nothing to do with his father's court case. E F

[26] Since 2011, he was no longer staying with his parents as he had moved out and is now currently staying with his new wife, Khatijah Ibrahim. He further states that he is not the one charged with the offence in court. In any event M had already testified in court on 22 May 2012 without any harassment from him (PH) nor his family. G

[27] As regards the fear that PH might convert M into the Islamic faith, he denied that possibility. To him, M should be able to decide for herself what faith she wants when she is ready. H

[28] Having heard the submissions by both parties and having read the affidavits, I have come to the following finding. I

A (a) This court has the power and jurisdiction to vary the *decree nisi* and the agreement. Section 97 of the Law Reform (Marriage and Divorce) Act 1976 provides:

> 97. Power for court to vary agreement for custody or maintenance.
>
> B
>
> The court may at any time and from time to time vary the terms of any agreement relating to the custody or maintenance of a child, whether made before or after the appointed date, notwithstanding any provision to the contrary in any such agreement, where it is satisfied that it is reasonable and for the welfare of the child so to do.
>
> C

[29] The word "agreement" would include the agreement which is part of the *decree nisi*.

D (b) Counsel for PW submitted that the allegation of sexual abuse by PH's father is supported by documentary evidence of the charges against him as has been reproduced above. I agree with her submission because PH's father was charged in court and that the trial is still continuing.

E

There is no doubt that more care should be given when dealing with the issue of contact in light of allegations of sexual abuse, as a child who is a victim of sexual abuse would be in dire need of this court's protection. When faced with this situation the court has an additional duty to protect under the Child Act 2001 where s. 17 of the said Act provides:

F

> 17 Meaning of child in need of care and protection
>
> G (1) A child is in need of care and protection if:
>
> (a) the child has been or there is substantial risk that the child will be physically injured or emotionally injured or sexually abused by his parent or guardian or a member of his extended family;
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> H
>
> (b) the child has been or there is substantial risk that the child will be physically injured or emotionally injured or sexually abused and his parent or guardian, knowing of such injury or abuse or risk, has not protected or is unlikely to protect the child from such injury or abuse;
>
> I

[30] To my mind, the extended family as provided by s. 17 above would include M's grandfather ie, Rupert Goldman. If the *decree nisi* is not varied, there is a real risk that M might be harmed either physically, emotionally or sexually. The risk is too great and too real and this court is under a duty to protect M from harm.

(c) In the case of *Hoo Tat Fong lwn. Lim Cheun Eng* [2001] 2 CLJ 638; [2001] 5 MLJ 660, Her Ladyship Rahmah Hussain (as she then was) said:

> (1) Upon giving due consideration to the facts surrounding the case and the submissions of both counsels, for the safety of the two children, namely Lim Mun Yee and Lim Jia Yee, the order dated 4 February 1999 ought to be altered to give the custody, care and control of the children to the defendant while the weekly access to the son, Lim Zi Shien, is upheld (see p 667A-8).
>
> (2) Although legal principles stated in the second part of s. 88(3) of the Law Reform (Marriage and Divorce) Act 1976 discourages interference with a child's life by changing custody, the facts of the case show that there is a serious allegation (sexual abuse) which involves the current home of the children, therefore, for their safety and welfare, the court has to protect the children by moving them to a safer and more suitable home, that is their natural father's (the defendant's) home, where they were brought up and cared for by their grandmother and aunt before the court order dated 4 February 1999 was made (see p 667C-D).

[31] I see it proper that M should be protected based on the above reasons and following the decision of Her Ladyship Rahmah Hussain.

(d) I had interviewed M on 1 August 2012. She said that she would like to stay with her mother as she feels safe with her. She does not feel safe and comfortable with her father because he (father) might take her to see her grandfather and she does not want to go to grandfather's house because "he had done something bad to me". She said her grandfather might get angry with her because she told her mother (PW) what the grandfather did. She is also scared he might do it again. She continued by saying that what her grandfather did to her was not so nice and not a good thing to do. She asked herself "why did he do it to me?". She was angry and upset.

[32] She then related how it first happened. It started when she was younger up until the time she was in hospital with appendicitis. She also told me she has bad dreams, weird and scary. In her dreams it was her father, her grandfather, grandmother and auntie chasing her. She ran with her friend and hid behind a red curtain like the back of a stage. Her grandfather saw them and then they ran away.

[33] From the interview, it is quite clear that M does not want to be with her father or grandparents because she feels unsafe and scared of them.

[34] Now, with the interview and the fact that the grandfather had been charged with four counts under s. 354 of the Penal Code and the fact that M had given evidence in court against the grandfather, I find that there is a substantial risk that M will be physically injured, or emotionally injured or sexually abused by her family including the extended family especially her grandfather.

[35] As regards staying with her father and stepmother, some guidance can be obtained from the case of *Soon Peck Wah v. Woon Che Chye* [1998] 1 SLR 234, a decision of the Court of Appeal, Singapore. Chief Justice Yong Pung How said:

> The contention that the infant should remain with the father by reason of the fact that the respondent's sister had been taking good care of the child was untenable. A surrogate mother, no matter how good she claims to be, can be no perfect substitute or replacement for the natural mother.

[36] Similarly in our case, the stepmother can never be a good surrogate mother.

[37] Counsel for PW submitted that in addition to allegations of sexual abuse, the wishes of the child should also be taken care of when deciding on the welfare of the child. She submitted that s. 88(2)(b) of the Law Reform (Marriage and Divorce) Act 1976 is in conformity with art. 12 of the Convention on the Rights of the Child wherein Malaysia is a signatory. Article 12(1) is reproduced below:

> Article 12
>
> 1. States Parties shall assure to the child who is capable of forming his or her own view to express those views freely in all matters affecting the child, the views of the child be due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules national law.

[38] Also, the above art. 12 is in a way reflected in s. 88(2)(b) of the Law Reform (Marriage and Divorce) Act 1976 as follows:

(2) In deciding in whose custody a child should be placed the paramount consideration shall be the welfare of the child and subject to this the court shall have regard:

(a) …

(b) to the wishes of the child, where he or she is of an age to express an independent opinion.

[39] In fact, I am taking the wishes of M into consideration because of what she said at the interview.

[40] Having considered all the above including the Convention on the Rights of the Child and s. 88(2)(b) of the Law Reform (Marriage and Divorce) Act 1976, I am allowing prayers (a), (b), (c) and (d) of encl. 10.

[41] I now come to the other prayers. First maintenance. PW seeks to vary the agreement and ask for maintenance of RM3,000. During submissions, I had asked PW's counsel to show proof of the items sought which would entitle PW to RM3,000. Having gone through the relevant documents, in support of maintenance of RM3,000. only certain items can be allowed. I am therefore allowing sum of RM1,610 per month beginning November 2012. I am allowing the items relating to school fees, text books and uniform, tuition for Bahasa Malaysia and Mathematics, swimming lessons, hip hop jazz, singing classes, guitar lessons, transportation to school, toiletries, entertainment and medical counseling expenses. M had not started some of the classes. Nevertheless I am allowing it because this is in line with the report from Aida Farhana Suhaimi, psychologist dated 29 June 2012 which recommends therapeutic play sessions.

[42] As for prayer (f) it is only natural that a father pays for the medical expenses, dental expenses, educational expenses and additional expenses until the child complete her tertiary education.

[43] As PW is given guardianship, custody, care and control of M, it is only natural that PW is given M's passport to be held by PW.

[44] Paragraphs (h) and (i) relates to a trust fund of M, set up under the agreement. So, paras. (h) and (i) should also be allowed.

Summary

[45] Based on the above reasons, I am making the following orders:

(a) Bahawa perjanjian perceraian yang dilampirkan bersama *decree nisi* bertarikh 29 November 2010 dibenarkan untuk diubahkan;

(b) Bahawa hak penjagaan, jagaan, kawalan dan pemeliharaan tunggal (sole guardianship, custody, care and control) anak perkahwinan, (M) (selepas ini dirujuk sebagai "anak tersebut") diberikan kepada pempetisyen isteri;

(c) Bahawa pempetisyen suami dinafikan akses kepada anak tersebut sehingga penyelesaian Kes Jenayah No. 183761-01-2012 dan 183762-01-2012 Rupert Goldman;

(d) Bahawa pempetisyen suami dilarangkan daripada mendedahkan anak tersebut kepada ahli keluarga pempetisyen suami;

(e) Bahawa pempetisyen suami membayar nafkah sebanyak RM1610 sebulan untuk anak tersebut; mulai bulan November 2012;

(f) Bahawa pempetisyen suami membayar untuk kesemua perbelanjaan perubatan, pergigian, pendidikan dan aktiviti tambahan anak tersebut sehingga anak tersebut menghabiskan pendidikan tertiari;

(g) Bahawa pasport antarabangsa anak tersebut untuk diserahkan kepada pempetisyen isteri dalam tempoh tujuh hari dari tarikh perintah ini;

(h) Bahawa pempetisyen dijadikan pemegang amanah ('trustee') untuk dana pendidikan anak tersebut;

(i) Bahawa pempetisyen suami mengemukakan maklumat tentang dana pendidikan dan insuran anak tersebut seperti dinyatakan dalam perjanjian perceraian, dalam tempoh masa tujuh hari daripada tarikh perintah ini;

(j) Kos permohonan ini ditanggung pempetisyen suami sebanyak RM5,000.